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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MARVELLUS RUBIN, Defendant and Appellant.	A154200 (City & County of San Francisco Super. Ct. No. SCN 227786)

Defendant Marvellus Rubin appeals from a judgment following a jury trial in which he was convicted of attempted second degree burglary of a vehicle (Pen. Code,[1] §§ 664/459) and petty theft from another vehicle (§ 490.2, subd. (a)). He claims the trial court erred in instructing the jury on attempted burglary using CALCRIM No. 460 because the instruction effectively eliminated the intent element. We reject this contention and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant was charged by information with second degree burglary of a vehicle (§ 459;[2] count one) and petty theft (§ 490.2, subd. (a); count two). The information alleged that defendant had previously been convicted of two prior strike offenses (§§ 667, subds. (d), (e), 1170.12, subds. (b), (c)) and four prison priors (§ 667.5, subd. (b)).

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1 All undesignated statutory references are to the Penal Code.

2 Section 459 states in pertinent part that a person is guilty of burglary if he or she enters a "vehicle as defined by the Vehicle Code, when the doors are locked" with the intent to commit grand or petit larceny or any felony.

The evidence at trial established the following. At around 6:45 p.m. on May 25, 2017, San Francisco Police Sergeants Brent Dittmer and Matt Sullivan were in an unmarked car on Sansome Street near Union Street when they saw defendant crouching on the sidewalk next to a parked Toyota Prius. Finding defendant's behavior suspicious, the officers stopped to observe. Dittmer stood about eight cars away from defendant and watched him repeatedly leaning his back against the Toyota's front passenger door and then moving away when people walked by. Dittmer did not see any broken windows on the Toyota or glass on the ground. After observing defendant in this manner for about five minutes, Dittmer saw a woman approach defendant in a confrontational manner. Eventually, defendant got on his bicycle and left the scene.

The woman, Jordan Brausen, testified that she saw defendant standing near the Toyota and staring into the passenger window on the vehicle's right side. As she walked past defendant, she looked over her shoulder and saw him turn his back towards the vehicle and "bash the window open" with his right elbow. When asked if she saw defendant's elbow go through the window, Brausen testified, "Yes. I mean, I saw the force of it go through and it going through the actual window. I saw him hit the window. I saw the glass shatter. If you're asking if I saw his elbow physically go through the actual non-broken glass, I can't confirm that. But I saw him force his elbow through the window." Brausen further testified that after she saw defendant break the window, she confronted him and told him to get away from the car. The two argued for a moment before defendant got on a bicycle and rode away. Brausen was then approached by Sergeant Dittmer, who took her statement.

Sergeant Dittmer examined the Toyota and found its doors locked and the front passenger side window broken. Inside the car, he saw a gallon-sized Ziploc bag with coins in it. Dittmer sent out a broadcast to other officers in the area describing defendant and his conduct of "casing"[3] a vehicle near Sansome and Union Streets.

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[3] Sergeant Dittmer explained that "casing" in this context refers to the behavior of a person evaluating whether to commit an auto burglary, i.e., looking into parked vehicles for items to steal, and looking around the area for witnesses, police officers, or cameras.

Officer Matthew Parra received the broadcast and spotted defendant riding a bicycle and peering into parked vehicles. Parra followed defendant on foot to Front Street and saw him approach a parked Honda Accord. Parra saw defendant inspect the vehicle and look around to see if he was being watched. Parra then saw defendant open the door to the Honda and enter the vehicle.

Officer James Pucinelli also heard the broadcast and saw defendant casing a vehicle. Pucinelli followed defendant to Front Street and saw him casing the Honda, standing on the passenger side of the car and looking up and down the block several times. Defendant placed a backpack on the sidewalk, opened the door to the Honda, and leaned in. The trunk popped open, and defendant exited the Honda with several items, which he began placing inside the backpack. Pucinelli, Dittmer, and other officers converged and arrested defendant. On the sidewalk near defendant were several items including a global positioning system (GPS) device and charger.

Dana Deras identified the Honda and GPS device as belonging to her. Deras testified she had not given defendant permission to enter her car or take her belongings. She further testified she normally locked her car doors, but did not recall if she had locked the doors on the date of incident.

It was stipulated at trial that the owner of the Toyota had parked the car on Union Street earlier in the day and had left the doors locked and the windows intact. He had also left a bag of coins on the center console. When he returned to the car at 9:50 p.m. that evening, he found the front passenger window broken. He did not know defendant or give him permission to enter his car or break its window.

The jury found defendant not guilty of second degree burglary on the Toyota, but guilty of the lesser included offense of attempted second degree burglary.[4] The jury also found defendant guilty of petty theft of the contents of the Honda. The trial court found true the two section 667 prior strikes and three of the four section 667.5 prior prison

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[4] The jury also found defendant guilty of the lesser included offense of tampering with a vehicle (Veh. Code, § 10852), but the trial court struck this conviction.

terms.[5] Defendant was sentenced to the upper term of 36 months custody on count one, and to a consecutive term of 320 days in county jail on count two, with 320 days' credit for time served.

DISCUSSION

CALCRIM No. 460 is the standard pattern instruction for "attempts" other than attempted murder. Here, the trial court instructed the jury on attempted burglary with CALCRIM No. 460, as follows:

"As a lesser included offense of Count 1, the defendant is charged with attempted burglary in violation of Penal Code section 664/459. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant took a direct but ineffective step toward committing burglary; [¶] AND [¶] 2. The defendant intended to commit burglary.

"A *direct step* requires more than merely planning or preparing to commit a burglary or obtaining or arranging for something needed to commit burglary. A direct step is one that goes beyond planning or preparation and shows that a person is putting his or her plan into action. *A direct step indicates a definite and unambiguous intent to commit burglary.* It is a direct movement towards the commission of the crime after preparations are made. It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstance outside the plan had not interrupted the attempt." (Some italics added.)

In a separate paragraph, the instruction stated: "To decide whether the defendant intended to commit burglary, please refer to the separate instructions that I have given you for that crime (1700 Burglary)."[6]

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[5] However, the prior prison terms were stricken for purposes of sentencing.

[6] The separate instructions stated that in order for defendant to be guilty of burglary, the People had to prove that defendant entered a locked vehicle intending to commit theft. To decide whether defendant intended to commit theft, the instruction referred the jury to the separate instruction for theft. The trial court's petty theft instruction stated that to prove defendant was guilty of this crime, the People had to prove that he took the property of another without the owner's consent while intending to deprive the owner of

Defendant's single claim of instructional error argues that one portion of CALCRIM No. 460—instructing that a "direct step indicates a definite and unambiguous intent to commit burglary"—effectively eliminated the intent element for the target offense of burglary by stating that proof of a direct act necessarily establishes proof of intent.[7] Defendant argues this error violated his due process rights because it lightened the prosecution's burden to prove all the elements of the crime. Defendant further contends there is a reasonable probability he would have obtained a more favorable outcome in the absence of the claimed error because it was a "close case" whether he had the requisite intent to commit burglary, as demonstrated by his acquittal on the burglary count.

"[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." (*People v. Burgener* (1986) 41 Cal.3d 505, 538 (*Burgener*) disapproved on other grounds in *People v. Reyes* (1998) 19 Cal.4th 743, 753.) "The test is whether there is a reasonable likelihood that the jury understood the instruction in a manner that violated the defendant's rights." (*People v. Andrade* (2000) 85 Cal.App.4th 579, 585.) The omission of an element of the offense from a jury instruction is a constitutional error subject to the harmless-beyond-a-reasonable-doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*). (*Neder v. United States* (1999) 527 U.S. 1, 8–16 (*Neder*).) Where the record contains no evidence that "could rationally lead to a contrary finding with respect to the omitted element," there has been no " 'denigration of the constitutional rights involved.' " (*Id.* at p. 19.)

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it permanently or to remove the property from the owner's possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property.

[7] Defendant acknowledges his trial counsel did not object to the instruction or request clarifying language in the proceedings below. We will assume the claim of error is not forfeited, however, because defendant contends the instruction incorrectly stated the law. (*People v. Hudson* (2006) 38 Cal.4th 1002, 1011–1012.)

As indicated, defendant's claim of instructional error is based on a single sentence in CALCRIM No. 460—"A direct step indicates a definite and unambiguous intent to commit burglary."—rather than the instructions as a whole. (*Burgener*, *supra*, 41 Cal.3d at p. 538.)

Viewed in context, the challenged sentence merely authorized a permissible inference that evidence of a direct act may be relevant to proving intent, which is not legally erroneous. The specific intent element for burglary " ' "is rarely susceptible of direct proof and must usually be inferred from all of the facts and circumstances disclosed by the evidence." ' " (*People v. Holt* (1997) 15 Cal.4th 619, 669–670 (*Holt*).) Thus, it was not improper to instruct that defendant's intent to burglarize the Toyota could be inferred from the evidence of his direct act, e.g., his breaking of the Toyota's window after casing the vehicle moments before.

Moreover, viewed in their totality, the jury instructions did not improperly conflate the mental state and act elements of the crime of attempted burglary so as to lighten the prosecution's burden to prove both elements. As given here, CALCRIM No. 460 instructed that the People had to prove a direct but ineffective act towards commission of the burglary *and* the intent to commit burglary. It contained separate paragraphs regarding each element, and the challenged language appeared in a paragraph discussing the direct act element. Significantly, the challenged language was one of several sentences in this paragraph describing what was required for the jury to find that an act constituted a direct step towards commission of the crime. "Read in context, it is readily apparent the challenged language refers to the act that must be found, and is part of an explanation of how jurors are to determine whether the accused's conduct constituted the requisite direct step or merely insufficient planning or preparation." (*People v. Lawrence* (2009) 177 Cal.App.4th 547, 557 [rejecting similar challenge to CALCRIM No. 600 (attempted murder)].)

Finally, a separate paragraph of CALCRIM No. 460 instructed that in determining whether defendant intended to commit burglary, the jury must consider the separate instruction for burglary, which in turn, referred to the separate instruction for theft. (See

fn. 5, *ante*.) An earlier instruction advised the jury to "consider [the instructions] together," and we assume the jurors were capable of understanding and correlating all the instructions that were given. (*People v. Richardson* (2008) 43 Cal.4th 959, 1028.) In light of the instructions as a whole, which separately discussed the intent and act elements of attempted burglary and instructed the jury to determine intent based on multiple separate instructions, we conclude it is not reasonably likely the jury misconstrued the challenged portion of CALCRIM No. 460 in isolation and misapplied it as defendant contends.

In any event, even if we assume error, no prejudice appears. Defendant points to no evidence in the record that could rationally support a finding that he lacked the intent to burglarize the Toyota (*Neder*, *supra*, 527 U.S. at p. 19), and there was overwhelming circumstantial evidence of such intent. (*Holt*, *supra*, 15 Cal.4th at pp. 669–670.) Brausen and Sergeant Dittmer both testified that they saw defendant looking into the Toyota's passenger side window for several minutes, where a large bag of coins was in plain view. Defendant then smashed the window, fled after being confronted, and moments later, was seen by two other police officers casing several other vehicles and stealing items from the Honda. On this record, the claimed instructional error on the intent element was harmless beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. at p. 24.)[8]

DISPOSITION

The judgment is affirmed.

[8] We are not persuaded by defendant's assertion that his acquittal on second degree burglary most likely reflects the jury's determination that he lacked the intent to commit burglary. Given Brausen's inconsistent testimony on whether she saw defendant's arm go through the window of the Toyota, the record suggests that the jury likely concluded that defendant attempted to, but did not enter, the vehicle.

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Fujisaki, J.

WE CONCUR:

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Siggins, P. J.

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Wiseman, J. *

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* Retired Associate Justice of the Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.